IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

FRIDAY, THE 26TH OCTOBER 2007 / 4TH KARTHIKA 1929

AS.No. 182 of 2001()

OS.19/1997 of SUB COURT,THODUPUZHA
.....

APPELLANTS/PLAINTIFFS:
---

1. S.KRISHNA BABU, S/O.K.SENAPATHY,
RESIDING AT B-76, GIRINAGAR NORTH,
ERNAKULAM, KOCHI - 682 020.

2. S.RAMACHANDRA PRASAD,N S/O.K.SENAPATHY,
'BRINDAVAN', 17-2ND STREET,
MEENA ESTATE (MEENA),
COIMBATORE - 641 028.

BY ADV. SRI.S.EASWARAN
SRI.ALIAS M.CHERIAN

RESPONDENTS:
---

1. K.VAIDYANATHAN, S/O.LATE N.K.KRISHNA IYER,
SLIVER HILL, THODUPUZHA - 685 584.

2. K.HARIHARAN, S/O.LATE KRISHNA IYER,
-DO- -DO-

3. K.SENAPATHY, S/O.LATE N.K.KRISHNA IYER,
BRINDAVAN, ANAKODE KADAVU, THODUPUZHA.

4. SARASWATHY MAHADEVAHN,W/O.LATE K.MAHADEVAN,
VELLUKUNNU HOUSE, THODUPUZHA.

5. M.KANNAN, S/O.LATE K.MAHADEVAN,
-DO- -DO-

6. CHITRA MOHAN, D/O.K.MAHADEVAN,
W/O.T.G.SUBBARAMAN, "SREELAKSHMI",
UNITY BOARD, CHANGAMPUZHA NAGAR,
KOCHI - 682 023.

R1,4,5 & 6 BY ADV. SRI.R.HARIKRISHNAN
SRI.C.A.RAJEEV
SMT.A.SINDHULAKSHMY
SMT.SARITHA DAVID CHUNKATH
SRI.S.K.MURALEEDHARA KAIMAL

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 25/09/2007, THE COURT ON 26/10/2007 DELIVERED THE FOLLOWING:

A.S.NO.182/2001

ORDER ON CMP.NO.1284/2001 IN A.S.NO.182/2001

DISMISSED

Sd/- P.R.RAMAN, JUDGE.

26/10/2007 Sd/- V.K.MOHANAN, JUDGE.

P.R.RAMAN & V.K.MOHANAN, JJ.

A.S.NO.182 OF 2001

Dated this the 26th day of October, 2007

JUDGMENT

Raman, J.

Plaintiffs are the appellants. Suit was one for declaration and separate possession of the plaint schedule properties. Originally there were 4 defendants in the suit. During the pendency of the suit the 2nd defendant Sri K.Mahadevan died and his legal heirs were impleaded as additional defendants 5 to 7. The suit was dismissed by the trial court, against which the present appeal is filed.

2. The questions that arise for consideration in this appeal is (i) whether the plaint schedule properties are co-parcenary properties and if so, whether the plaintiffs acquired right by birth and hence available for partition, (ii) whether the right if any of the plaintiffs extinguished by the release deed (Ext.A5) executed by the 4th defendant, the father of the plaintiffs, (III) whether the suit is barred by limitation and (iv) whether defendants 1 to 3 and 5 to 7 perfected their title by adverse possession.

3. The material averments as gathered from the plaint and the

written statement filed by the parties which are relevant for answering the above questions may be briefly stated as follows:

Plaint A schedule property consists of an extent of 10.08 acres. Plaint B schedule property consists of an extent of 3.500 cents. According to the plaintiff, plaint A schedule property originally belonged to one Sri Krishnayyan, Pazhayadath Puthenmadom, Thodupuzha and he was in possession and enjoyment of the same. Krishnayyan had 3 sons, viz., Krishna Iyer, Narayana Iyer and Neelakanda Iyer. Neelakanda Iyer died long ago surviving him his widow Smt.Kaveri Ammal and 4 daughters, viz., Parvathi, Lakshmi, Savithri and Thankamma and one son Hariharan. Krishna Iyer died on 10/6/1971 and his wife Parvathy Ammal died in the year 1976. Krishna Iyer and Parvathy Ammal had four sons, who are defendants 1 to 4. Plaintiffs are two sons of the 4th defendant. During the life time of Krishnayyan plaint A schedule properties were allotted in favour of his eldest son, Krishna Iyer, who is the grandfather of the plaintiffs, as per document No.912 dated 24/4/1120 M.E. of the Sub Registry, Thodupuzha styled as a partition deed, produced as Ext.A1 in this case. In respect of other properties excluding plaint A schedule properties Krishnayyan executed a settlement deed as per document

No.3601 dated 5/12/1121 M.E. of Sub Registry, Thoudupuzha produced as Ext.A2 in this case, settling the properties in favour of his sons; Krishna Iyer, Narayana Iyer and Neelakanda Iyer. Since Neelakanda Iyer was no more at the time of such settlement deed, his legal representatives, his widow Kaveri Ammal and children Lakshmi, Savithri, Thankamma and Hariharan were included in the said settlement deed. Parvathy, daughter of late Neelakanda Iyer however was excluded from the settlement deed for the reason that she was married at that time.

4. Plaint A schedule properties was acquired by Krishna Iyer. Krishna Iyer died on 10/6/1971 leaving his wife Parvathy Ammal and his children who are defendants 1 to 4. According to the plaintiffs, they are therefore entitled to 1/5th share over the plaint schedule properties as per the provisions of the Hindu Succession Act, 1956. Plaintiffs and their sister Geetha are the children of the 4th defendant. On the death of Krishna Iyer, the 4th defendant is thus entitled to 1/5th share over plaint A and B schedule properties. The 4th defendant and the plaintiffs form a co-parcenary and hence entitled to 1/5th share of the 4th defendant over the plaint schedule items. Even otherwise the 4th defendant and the plaintiffs would form a joint family entitled to 1/5th share over paint A

and B schedule properties. According to the plaintiffs, they were away from Thodupuzha for their studies and recently before instituting the suit when they visited to the ancestral home at Thodupuzha, they noticed the activities among defendants 1 to 3 for partition of plaint A schedule properties. The lst defendant is in possession of the plaint schedule items for and on behalf of the joint family. Defendants 1 to 3 were evasive to the various enquiries made by the plaintiffs regarding their attempt of partition among themselves of the plaint schedule items. Hence, they sent a letter dated 21/12/1996 to the lst defendant to inform regarding their proposal and whether the plaintiffs are allotted any share. To this the lst defendant replied saying that the schedule properties were owned and possessed by late N.K.Krishna Iyer absolutely and hence the plaint schedule items are not joint family properties and the lst defendant is the Manager of the family. It is stated that the schedule properties belonged to the defendants and Parvathy Ammal, and during her life time Paravathy Ammal joined the 4th defendant to execute a release deed as early as in 1972 and therefore there is nothing to be partitioned. It was for the first time that the plaintiffs then came to know from the reply of the release deed said to have been executed by the 4th defendant father along

with their mother, Parvathy Ammal and hence they made enquiries with the Sub Registra's Office and came across the release deed as also the partition deed by which defendants 1 to 3 partitioned and allotted among themselves the plaint schedule properties. Hence they obtained certified copies of these documents. Document No.325 dated 8/2/1972 is the release deed executed by the 4th defendant along with Parvathy Ammal in favour of defendants 1 to 3. This document is marked as Ext.A5. Partition deed No.4588/96 dated 23/12/1996 is marked as Ext.A6 in this case. It is averred that 1/5th share of udukkoor rights over plaint A and B schedule properties of the 4th defendant and Parvathy Ammal purported to have assigned in favour of defendants 1 to 3 as per Ext.A5. It is the case of the plaintiffs that the release deed No.325 dated 8/2/1972 (Ext.A5) and the partition deed No.4588 dated 23/12/1996 (Ext.A6) to the extent they purported to deal with the share of plaint A and B schedule properties are void abinitio and hence liable to be declared so by the court. According to them, on the death of Krishna Iyer on 10/6/1971 the properties devolved on his legal representatives, the defendant as well as his widow Parvathy Ammal. The 4th defendant being one of the sons and heir of Krishna Iyer is entitled to 1/5th share over the plaint

schedule items and plaint A schedule property in the hands of Krishna Iyer is a co-parcenary property being ancestral in nature; obtained by Krishna Iyer from his father Krishnayyan as per document No.912/1120 M.E. (Ext.A1). The 1/5th share to which the 4th defendant was entitled to on the death of his father Krishna Iyer is also ancestral in his hands. Therefore, the plaintiffs are entitled to equal share over 1/5th share of the 4th defendant over the plaint schedule items. Hence, the 4th defendant could not purport to release or assign the plaintiffs' right acquired by birth. According to them, the 4th defendant had only a share over 1/5th share obtained by him over the plaint schedule properties on the death of his father and therefore, except to the extent of his right over the plaint schedule item, the right that was acquired by the plaintiffs could not have been validly released in favour of defendants 1 to 3. In other words, the assignment cannot affect 1/3rd share each of the plaintiffs over 1/5th share obtained by the 4th defendant over the plaint schedule item. To that extent, the release deed No.325 dated 8/2/1972 (Ext.A5) is liable to be declared void ab initio. Alternatively it is contended that the 4th defendant and plaintiffs formed a joint family at the time when Krishna Iyer died on 10/6/1971. The 1/5th share of the plaint schedule items

inherited by the 4th defendant on the death of Krishna Iyer on 10/6/1971 is the nucleus. Plaintiffs are co-owners of 1/5th share of 4th defendant over the plaint schedule item and hence the assignee cannot claim exclusive right over the plaint schedule item in-exclusion of the other co-owners. Plaintiffs claim 1/3rd right each over 1/5th share of the 4th defendant over the plaint schedule item. In the circumstances, they sought for a decree declaring Ext.A5 (document No.325 dated 8/2/1972) and Ext.A6 (document No.4588 dated 23/12/1996) are void ab initio and not binding on the plaintiffs and for setting aside those documents to the extent of 1/3 share of each of the plaintiffs over 1/5th share of the 4th defendant over the plaint schedule item. They also claimed for partition of the plaint schedule item and for separate possession of their share and for a permanent prohibitory injunction restraining the defendants 1 to 3 from dealing with plaint schedule item.

5. Defendants 1 to 3 contended that by virtue of the release deed executed by the 4th defendant and his wife they cease to have any right thereafter and subsequently defendants 1 to 3 have also partitioned the plaint schedule item as per Ext.A6 partition deed. They also contended that the plaint schedule item held by Krishna Iyer is self acquired

property. Though Ext.A1 the nomenclature shown may be partition deed from the recitals contained therein and from the subsequent settlement in which reference is made to the earlier deed, it is only a gift deed and the plaint A schedule items were self acquisition of Krishnayyan and there was no pre-existing right to be partitioned between Krishnayyan and his son, Krishna Iyer. Thus both plaint A and B schedule properties were self acquired properties of Krishnayyan and hence not co-parcenary and the plaintiff have no right by birth. After the death of Krishna Iyer, plaintiffs father, the 4th defendant, along with his wife having released their undivided right in favour of defendants 1 to 3, the plaintiffs should be non-suited for partition. They also contended that the suit is barred by limitation. They also contended that the plaint schedule properties were not ancestral properties and never treated as such. Actually, Krishnayyan had no means to purchase A schedule properties and it was late Krishna Iyer, who purchased it in the name of his father besides other properties in the name of his wife etc. It is not correct to say that the 4th defendants and the plaintiffs are co-owners of 1/5th share of the 4th defendant over the properties. Apart from the huge debts whatever properties obtained by the 4th defendant from the family were lost, spoiled or wasted by

himself. Plaintiffs are looking after their parents at Thodupuzha. They had been coming to Thodupuzha every week and hence it is false to say that they came to know the entire affairs only recently.

6. The evidence consists of Exts.A1 to A6 marked on the side of the plaintiffs, the lst plaintiff gave evidence as PW-1 and the 3rd defendant gave evidence as DW-1. No documents were marked on the side of the defendants. Registered copy of the document No.912 dated 24/4/1120 M.E. is executed by Krishnayyan, styled as a partition deed ( ). But from the recitals in this deed it is clear that the executant had no ancestral properties and that he had acquired properties by his own efforts and he is in exclusive possession and enjoyment of the same.

"

"

7. It is out of those properties that the properties mentioned therein were purchased by him as per registered document of the Sub Registry, Thodupuzha and that the property scheduled therein were gifted in favour of Krishna Iyer. Thus even going by the recitals in this deed the property was purchased by the executant as per registered deed of the Sub Registry, Thodupuzha. Admittedly, this is the plaint A schedule property. As a matter of fact, the plaintiffs themselves have described this deed in the plaint as a gift deed. There is also a declaration that he had no ancestral property and he had purchased various other items including this property of which this item is assigned in favour of Krishna Iyer, one of his sons. Since Krishna Iyer had no pre-existing right and going by the recitals contained in the deed, this is only a gift deed executed in favour of Krishna Iyer. Admittedly, the plaint B schedule items were acquired by Krishna Iyer during his life time. Thus both the plaint A and B schedule items do not have the characteristic of any ancestral property. Plaint B schedule property having been acquired by Krishna Iyer and Plaint A schedule properties obtained by him as per gift deed executed by his father, Krishnayyan, both plaint A and B schedule items are self acquisition in the hands of Krishna Iyer. Ext.A2 is a document dated

5/12/1121, which is styled as settlement deed ( ) executed by Krishnayyan in favour of Krishna Iyer, Narayana Iyer and Kaveri Ammal, minors Lakshmi, Savithri Thankamma, and Harihara Iyer. Krishna Iyer and Narayana Iyer are described as sons of Krishnayyan, the executant and Kaveri Ammal is described as wife of deceased Neelakanda Iyer. The minors are children of deceased Neelakanda Iyer. According to the executant, during his life time he decided to settle the properties which were acquired by him. There is a further declaration that those properties mentioned in the document are self acquisition and not an exclusive possession and enjoyment of the same. Vellookkunnu Madom and Purayidom is one such property which was given by way of gift in favour of Krishna Iyer, his son. Thus what was assigned under Ext.A1 was also the property acquired by him and in respect of which a gift deed was executed in favour of Krishna Iyer, one among the sons and also a beneficiary of Ext.A2. As per this document various properties described therein were settled. Ext.A5 is the document No.325 dated 8/12/1972 of the Sub Registry, Thodupuzha. This document was executed by Senapathy, son of Krishnayyan, and his wife Parvathy Ammal in favour of Vaidyanatha Iyer, Mahadeva Iyer and

Harihara Iyer. It is described as released deed ( ). As per this deed the executants relinquished their right over the properties scheduled thereunder. As per the recitals contained in the deed, after the death of Krishna Iyer on 10/6/1971 the scheduled properties belonged to him and after his death, by devolution all of them had equal right over the properties jointly held by them and whatever right the executant had over the schedule properties was already relinquished orally in favour of the executants and they were in exclusive possession of the same and with a view to acknowledge the same by a written document for consideration of Rs.20,0000/- received on different occasions. Ext.A6 is a document No.4588 dated 23/12/1996, which is a partition deed executed between Vaidyanatha Iyer, Mahadeva Iyer and Harihara Iyer.

8. According to the learned counsel, Sri Easwaran, appearing on behalf of the appellants, the property in the hands of their father, the 4th defendant obtained by him from Krishna Iyer, father of defendants 1 to 4 and grandfather of plaintiffs, is ancestral in nature. Plaintiffs being co-parcenars are entitled to 1/3rd right over 1/5th right acquired by their father, the 4th defendant. Hence, the release deed (Ext.A5) executed by their father, the 4th defendant cannot be treated as valid to the extent of

their share. At best only the share of their father, 4th defendant alone could have been given valid relinquishment under Ext.A5. Since the 4th defendant had only a fractional interest in the property, the right, title and interest of the plaintiffs as co-parcenars in no way are affected by such release deed. To the extent of their right and interest concerned, Ext.A5 is ab initio void and even without specifically seeking to set aside the said document, they can ignore the said document and claim partition. On the other hand, the learned counsel appearing on behalf of the respondents would contend that the properties were obtained by Krishna Iyer by two settlement deeds, Exts.A1 and A2. The recitals contained in Exts.A1 and A2 would abundantly make it clear that those properties were self acquisition by Krishnayyan, father of Krishna Iyer (grandfather of plaintiffs) and grandfather of defendants 1 to 4. If so, after the death of Krishna Iyer in 10/6/1971 the properties devolved on defendants 1 to 4 by way of succession under the Hindu Succession Act, 1956 and by virtue of Section 8 of the Hindu Successions Act, the share held by the 4th defendant is to be treated as self acquisition and by virtue of the release deed, Ext.A5 executed by the 4th defendant and his wife, defendants 1 to 3 are absolutely entitled to the said property and the plaintiffs would not

have acquired any right by birth. But according to the learned counsel for the appellants, if the properties are ancestral properties in the hands of Krishna Iyer, they have acquired a right by birth and they having been born long prior to 1956, devolution of their right and title would be governed by Section 6 of the Hindu Succession Act. Therefore the prime question is as to whether the plaintiffs had acquired any right by birth in the property held by Krishna Iyer prior to his death on 10/6/1971 and whether the property in the hands of Krishna Iyer is ancestral in nature. From the recitals contained in Ext.A1 and A2 to which reference has already been made, it is abundantly clear that Krishna Iyer obtained the plaint schedule item by two settlement deeds (Exts.A1 and A2) executed by his father Krishnayyan. Though Ext.A1 is styled as a partition deed, further recitals contained in the deed would clearly show that it is only a settlement deed. Krishnayyan, father of Krishna Iyer himself declared that those properties are self acquisition and not ancestral in his hands and that Ext.A1, which is a gift deed, is further supported by the recitals contained in the settlement deed, Ext.A2 also. If so, the properties obtained by Krishna Iyer can only be treated as self acquisition and not ancestral in his hands.

9. In **Commissioner of Wealthtax, Kanpur etc. v. Chander Sen etc. (AIR 1986 SC 1753)** the Apex Court had occasion to consider a case where a partition of joint family business between father and his only son and the business was continued by the father and the son formed a joint family with his own sons. The father died later and the question arose as to whether the amount standing to the credit of the deceased father in the account of the firm devolved on his son as his individual income. It was held that such income cannot be included in computing net wealth of son's joint family. The joint family business were partitioned between father and his only son and it was thereafter that they continued the business in the name of the partnership firm. The Wealth Tax Authorities while assessing the wealth tax in respect of the family of the son i.e. the assessee, included the amount in computing wealth. It was held that the son inherited the property as an individual and not as karta of his own family and hence it could no be included in computing the assessee's wealth. It was further held that under the Hindu law the son would inherit the property of his father as karta of is own family. But the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. The first rule is that

the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class I of the Schedule. In interpreting the provisions of Act it is necessary to bear in mind the preamble to the Hindu Succession Act. The preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus. In view of the Preamble to the Act i.e., that to modify where necessary and to codify the law, it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. If a contrary view is taken it would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu Law get a right by birth of the said property contrary to the scheme outlined in Section 8. Further more the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today that the property which devolved on a Hindu under Section 8

of the Hindu Succession Act would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu Family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc. The express words of Section 8 of the Hindu Succession Act cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law. With that background the express language which excludes son's son but included son of a predeceased son cannot be ignored.

10. In **C.N. Arunachala Mudaliar v. C.A.Muruganatha Mudaliar and another (AIR 1953 SC 495)** the Apex Court held that the Mitakshara father is not only competent to sell his self acquired immovable property to a stranger without the concurrence of his son, but he can make a gift of such property to one of his own sons to the detriment of another and he can make even an unequal distribution amongst his heirs. It was also held that in view of the settled law that a

Mitakshara father has absolute right of disposition over his self acquired property to which no exception can be taken by his male descendants, it is not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. There is no warrant for saying that according to the Mitakshara, an affectionate gift by the father to the son constitutes 'ipso facto' ancestral property in the hands of the donee. In other words, a property gifted or bequeathed by a father to his son cannot become ancestral property in the hands of

the donee or legatee simply by reason of the fact that the donee or legatee got it from his father or ancestor. As the law is accepted and well settled that a Mitakshara father has complete powers of disposition over his self-acquired property, it must follow as a necessary consequence that the father is quite competent to provide expressly, when he makes a gift, either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family. If there are express provisions to that effect either in the deed of gift or a will, no difficulty is likely to arise and the interest which the son would take in such property would depend upon the terms of the grant. If, however, there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction and the Court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the well-known canons of construction. In paragraph 12 of the judgment it was held as follows:

> ".....According to Mitakshara, the son has a right by birth both in his father's and grandfather's estate, but a distinction is made in this respect by Mitakshara itself. In the ancestral or grandfather's property in the hands of the father, while in the self acquired

> property of the father, his rights are unequal by reason of the father having an independent power over or predominant interest in the same. The son can assert this equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his life-time. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands."

11. In this case Krishna Iyer having obtained the plaint schedule items by virtue of the gift deed executed by his father Krishnayyan and not by virtue of his being the son or descendant of the owner but because his father bestowed a favour, which he could have bestowed on any other person as well. So merely because it was obtained by Krishna Iyer from his father it does not become ancestral in his hands. Thus, Krishna Iyer had absolute right of dispossession over the property during his life time which has obtained by him from his father by two gift deeds executed in his favour. Thus, defendants 1 to 4 did not acquire any right by birth over the property held by Krishna Iyer during his life time. It is only after the death of Krishna Iyer that the properties devolved by succession in

favour of his heirs included in Clause 1, as per Hindu Succession Act. If defendants 1 to 4 did not have acquire any right by birth and Krishna Iyer had absolute right of dispossession during his life time, there is no question of the plaintiffs acquiring any right by birth in the said property.

12. In **Yudhishter v. Ashok Kumar (AIR 1987 SC 558)** after referring to the decision in **Commissioner of Wealth Tax, Kanpur v. Chander Sen (AIR 1986 SC 1753),** it was reiterated that normally whenever the father gets a property from whatever source from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This position has been affected by Section 8 of the Hindu Succession Act, 1956 and therefore after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity.

13. In **Sheela Devi and others v. Lal Chand and another (2006) 8 SCC 581)** the Apex Court considered the question as to how devolution of co-parcenary property takes place and considered the

scope of Sections 6 and 8 of the Hindu Succession Act, 1956 and the devolution of co-parcenary property after commencement of 1956 Act. It was held that the effect of a son having been born prior to commencement of 1956 Act and as per the Mitakshara law in usage prior to the commencement of the 1956 Act, once a son was born, he acquired an interest in the co-parcenary property as an incident of his birth and hence a son having been born prior to commencement of 1956 Act would retain his share of the property as a co-parcenar even after the commencement of the 1956 Act, while the father's share shall devolve upon his heirs according to the provisions of 1956 Act. It was also held that so long as the property remains in hands of a single person, though it be inherited co-parcenary property, it would be treated as a separate property. But once a son is born, the concept of a property being co-parcenary property in terms of Mitakshara law, is revived. In that case one Tulsi Ram was the owner of the property. He died in the year 1989 leaving behind five sons of whom Babu Ram was one. The afore-mentioned five sons of Tulsi Ram were members of a M itakshara Coparcenary. Upon the death of Tulsi Ram, Babu Ram inherited 1/5th share in the property. Babu Ram died in the year 1989 leaving behind two sons (respondent-plaintiffs) and

three daughters (appellants). One of the son was was born in the year 1938 and the other in 1956. Although in 1927, Babu Ram had no son and the property in his hands became a separate property. But, as soon as a son was born to him the concept of the property being a co-parcenary property in terms of the Mitakshara School of Hindu Law revived. The succession had been opened in 1989 on the death of Babu Ram. Section 6(1) of the Hindu Succession Act governs the law relating to succession on the death of a co-parcener in the event the heirs are only male descendants. Placing reliance on this decision it was contended that in this case the plaintiffs, who were born prior to 1956, acquired the right by birth in the grandfather's property namely the property held by Krishnayyan, which right according to them, will not be lost by Hindu Succession Act, 1956. But this contention is raised forgetting the fact that Krishna Iyer had an absolute right of dispossession over his property and no right is acquired by his male descendants and as already stated defendants 1 to 4 have therefore acquired no right by birth and Krishna Iyer died only in the year 1971 long after the Hindu Succession Act. Hence succession takes place as per the Hindu Succession Act only.

14. As per Section 8 of the Hindu Succession Act, the property of a

male Hindu dying intestate shall devolve according to the provisions of this Chapter, firstly, upon the heirs, being the relatives specified in class I of the schedule. Section 6 of the Act only says that when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara co-parcenary property, his interest in the property shall devolve by surveyorship upon the surviving members of the co-parcenary and not in accordance with this Act. As per Explanation 1, for the purpose of this section, the interest of a Hindu Mitakshara co-parcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. But here as already stated, no right is acquired by the male descendants of Krishna Iyer till his death. So, Section 6 has no application.

15. The court below held that the suit is barred by limitation as per Article 109 of the Limitation Act, since the suit was instituted more than 12 years after Ext.A5 and they cannot validly seek to set aside Ext.A5, after the expiry of the period of 12 years. Ext.A5 being dated 8/12/1972 and the suit was filed only on 17/3/1997. According to the counsel for

the appellants, he need not specifically seek to set aside Ext.A5 and according to him, Ext.A5 is void ab initio and therefore he can ignore the same and during his argument he submitted that he is not pressing the relief for setting aside Ext.A5, but still he can validly maintain the prayer for separate possession. As per Article 65 of the Limitation Act, for claiming possession of immovable property or any interest therein based on title, the period of limitation prescribed is twelve years when the possession of the defendant becomes adverse to the plaintiff. But according to the plaintiffs/appellants, the possession can be said to become adverse to their interest only when there was an attempt to partition of the property by defendants 1 to 3 and only in 1996 the partition deed was executed whereas the suit was instituted in 1997 itself. If the release deed Ext.A5 is a document void ab initio and if defendants 1 to 3 are in possession of the property, lst defendant is the Manager, whose possession can only be on behalf of all the co-owners. In this connection he also placed reliance on the decision of this Court in **Paru v. Chiruthai (1985 KLT 563).** It was held that since a co-sharer in possession is a trustee for a co-sharer not in possession, there can be no question of any adverse possession, by any co-owner in possession. Mere

non-participation in the profits or non-payment of rent by themselves cannot amount to ouster.

16. In **Karbalai Begum v. Mohd. Sayeed and another (AIR 1981 SC 77)** the Apex Court while considering Articles 64 and 65 of the Limitation Act, held that it is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact is admitted, then the legal possession would be that the co-sharers in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees.

17. In **Mohd. Mohammad Ali v. Jagadish Kalita and others ((2004) 1 SCC 271)** the Apex Court held that possession of property by a co-sharer is deemed to be possession on behalf of other co-sharers unless there is a clear ouster by denying title of the other co-sharers. Mere long and continuous possession by itself is not enough. Plea of ouster has to be raised and proved. In a suit for declaration of title to the property, plaintiff has only to prove his title and not his possession and the defendant raising plea of adverse possession must prove the same along

with his animus possidendi.

18. **Sankaran Nair v. Govindan (1982 KLT 948)** was a suit for recovery of possession by junior members of tarwad property alienated without necessity of a tarwad property. The question arose as to whether it was necessary to set aside the sale. In that context, Articles 60 or 65 of the Limitation is relevant. It was held that there is no necessity for a junior member of a tarwad in impuging a transaction by its karanavan to file a suit to have the transaction set aside. He can ignore the transaction and recover possession to the property if the acts of the karnavan cannot be said to be within his powers. A junior member can treat an invalid alienation of his tarwad property as void, ignore it and sue to recover the property. There is no need to bring a suit to set aside the alienation and a junior member bringing a suit for recovery of possession of tarwad property alienated without consideration or necessity need not seek to set aside the document and neither Article 59 nor Article 60 of the Limitation Act can have any application to such a suit for recovery of possession. The only article of the Limitation Act that is applicable to such a suit is Article 65 as per which the period of limitation is 12 years from the date on which possession of the defendant became adverse to the plaintiff.

19. In this case if the plaintiffs could establish that they acquired right by birth in the property held by Krishna Iyer, then necessarily on his death, the right, title and interest of the plaintiffs cannot be validly extinguished Ext.A5. Since the 4th defendant will have only a fractional interest along with the plaintiff and if so execution of the release deed, Ext.A5, can in no way affect the right, title and interest of the plaintiffs, their right cannot be transferred without their consent. In this case according to the plaintiffs, they have already become majors as on the date of Ext.A5 release deed. If only the contention of the appellants that the property held by Krishna Iyer is ancestral in nature is accepted, then it has to be held that the suit will be governed by Article 65 of the Limitation Act and hence not barred.

Conclusion:

1) In the result, we hold that the plaintiffs have not succeeded in establishing that they had acquired any right by birth in the property held by Krishna Iyer. The contention of the appellants that the property in the hands of Krishna Iyer is ancestral in nature, is found against.

2) The 4th defendant and his wife having executed a release deed

Ext.A5 in favour of defendants 1 to 3 have no further right in the property. After the death of Krishna Iyer, when the property devolved on his legal heirs, (defendants 1 to 4 alone), the right, title and interest of the 4th defendant having been released in favour of the co-sharers, the plaintiffs have no right to seek partition.

3) In the circumstances of the case, it is not be necessary for the plaintiffs to seek to set aside Ext.A5 and the relevant article that would apply is Article 65 of the Limitation Act.

4) There is no evidence in this case to hold that the properties held by defendants 1 to 3 were adverse to the interest of the plaintiffs or that there is any ouster to the knowledge of the plaintiffs. If they are co-sharers of the property, the possession if any held by the lst defendant can only be on behalf of the co-sharers as a trustee. Hence, the suit is not shown to be barred under the provisions of the Limitation Act.

5) In view of the finding that the appellants/plaintiffs had no right in the plaint schedule property at the time of execution of the released deed Ext.A5 executed by the 4th defendant in favour of defendants 1 to 3, it has to be held that plaintiffs have no partible interest in the plaint schedule item.

In the result, confirming the decree and judgment passed by the court below, this appeal is dismissed. Parties shall bear their respective costs.

P.R.RAMAN,
Judge.

V.K.MOHANAN,
Judge.

kcv.

P.R.RAMAN & V.K.MOHANAN,JJ.

A.S.NO.182 OF 2001

JUDGMENT

26th October, 2007